May 22, 1998

Free Speech and Tobacco Advertising

Why Carrots Are Constitutional and Sticks Are Not

The tobacco bill (S. 1415) has come to the Senate floor. It has been modified since it was reported by the Commerce Committee, but it appears that the bill still raises numerous constitutional questions. Senator Hatch said during a hearing in the Judiciary Committee that the reported bill "suffers from a number of serious constitutional problems" under the First Amendment, the Bill of Attainder Clause (Art. I, Sec. 9, cl. 3), the Takings Clause of the Fifth Amendment, the Due Process Clause of the Fifth Amendment, and perhaps others.

This paper discusses only First Amendment issues.[1] It considers the key First Amendment test which the Supreme Court set out in the *Central Hudson* case and revisited most recently in the *44 Liquormart* case. After the Supreme Court had disposed of *44 Liquormart*, the Fourth Circuit upheld two Baltimore City ordinances that prohibit alcohol and tobacco advertising on billboards. Those cases are brandished as evidence that Congress can unilaterally prohibit tobacco advertising, and for that reason this paper takes a careful look at the Baltimore cases. We conclude that the cases provide a weak and impermanent foundation for a tobacco bill. When the strong winds of First Amendment doctrine begin to blow, any provisions of the tobacco bill that have been built upon the Baltimore cases will fall. Think of the First Amendment as *El Nino* and the Baltimore cases as a coastal California hillside.

The original tobacco agreement of 1997 anticipated that the tobacco industry would voluntarily relinquish many of its constitutional rights to speech and expression in exchange for the "carrot" of a liability cap. Today, that agreement is no longer in prospect. The tobacco companies withdrew from the deal when Congress made it significantly more burdensome to them. With the tobacco companies no longer on board, the idea of "the carrot" has been replaced with the idea of "the stick." However, "carrots" and "sticks" are not interchangeable. The Constitution limits what Congress may do with its "stick" of sovereign power. A tobacco bill that uses "sticks" rather than "carrots" to limit commercial speech is likely to fail constitutional review, while a bill that uses "carrots" has almost no constitutional problems.

---

[1] The First Amendment provides in relevant part, "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The Fixed Bond Between a Tobacco Bill and the Constitution

Say what you will about Joe Camel or the Marlboro Man or any other pitchman for tobacco, there are fundamental constitutional facts that Congress cannot ignore when it considers a tobacco bill. When the owners of Joe Camel or the Marlboro Man employ their costly cultural icons in an ad or on a package they are engaging in speech that is protected by the Constitution of the United States.

Years ago, this kind of (commercial) speech was given almost no protection by the federal courts, but those days are gone. Today, commercial speech is constitutionally protected (though not to the same extent as political speech) and the protection seems to grow and accelerate with each new Term of the Supreme Court.

The modern "commercial speech doctrine" usually is traced to the *Virginia Pharmacy* case in 1976 where the Supreme Court said:

> ". . . Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. . . ."[2]

First Amendment rights are not absolute, but tobacco manufacturers (and tobacco retailers and tobacco consumers) do indeed have rights of speech and expression under the First Amendment.

As last year's tobacco agreement contemplated, tobacco companies can waive their rights if they desire[3] and, indeed, they had agreed to do so in exchange for limits on their financial liabilities. Today, however, those waivers are no longer viable. As noted, the companies withdrew their assent when the committee reported a bill that was significantly more burdensome to them than the original agreement.

---

[2] *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976). This case, and others that have moved the Court along the path to its current position on commercial speech, was instigated and pursued by consumers, not by manufacturers or retailers.

[3] See, *e.g.*, *Snepp v. United States*, 444 U.S. 507, 509 n. 3 (1980) (per Curiam), where the Supreme Court upheld a contract between the United States and a former CIA agent that required pre-clearance of all publications written, or to be written, by the agent. The Court acknowledged that Mr. Snepp could waive his First Amendment rights, and had done so.

The Stakes in the Congressional Wager

In the absence of mutual agreement, Congress is now considering whether it has the sovereign authority to order the tobacco companies to fire Joe Camel and the Marlboro Man (and to take numerous other steps that will abridge the speech rights of the companies). Many members of Congress are preparing to gamble that they can pass a tobacco bill that will limit the speech of the companies but not violate the First Amendment.

Those members of Congress who are willing to make that bet argue along the following lines: The protection of the First Amendment is not absolute, especially for commercial speech. There is considerable leeway for government regulation, especially when the government is acting to protect children from a dangerous product such as tobacco which is harmful and addictive. Therefore, Congress can (and should) limit the speech of the tobacco companies in the interests of public health and welfare (especially of children). Also, the Department of Justice says the tobacco bill is constitutional.[4]

Those members of Congress who are reluctant to make the bet say the gamble is risky and costly. They agree that the Constitution does not give absolute protection to advertising, but the particular restrictions in the tobacco bill will fail the Supreme Court's current test for commercial speech, and the likelihood of that failure grows every year as the Supreme Court continues to strengthen the constitutional protections to which commercial speech is entitled. Some of the nation's leading authorities on First Amendment law think the bill is unconstitutional[5] and that Congress will lose its bet. The cost of that loss, say the congressional opponents of the committee's bill, will be measured in the lives and health of millions of young people who will get hooked on tobacco while lawyers and politicians spend years haggling over words.

The tobacco bill is bound to the Constitution as few other bills are. If the companies cannot be enticed back to the table (where they will voluntarily waive their rights), then Congress is going to have to pay special attention to constitutional questions — and the prudential implications of those questions: If the tobacco companies do not freely waive their constitutional rights to free speech, how far can Congress go in abridging their rights? How much risk is Congress willing to assume in the hope that this year's decisions will pass the formidable constitutional test when the inevitable lawsuits are pressed upon the federal courts?

---

[4] "Congress has the authority to impose significant restrictions on tobacco advertising in the absence of industry consent without infringing First Amendment rights." Prepared Statement of David W. Ogden, Counselor to the Attorney General, to the Sen. Judiciary Comm., May 13, 1998, p. 6 (mimeo).

[5] "Substantial doubts" about the constitutionality of the approach used in the committee-reported bill have been expressed by Robert H. Bork, Laurence H. Tribe, Floyd Abrams, Burt Neuborne, Rodney Smolla, Martin H. Redish, the ACLU, and the Washington Legal Foundation. Written Testimony of Burt Neuborne to the Sen. Judiciary Comm., May 13, 1998, p. 2 (mimeo).

The *Central Hudson* Test as Applied in *44 Liquormart*

The Supreme Court's current test for judging the constitutionality of a restriction on commercial speech was announced in *Central Hudson* and refined in subsequent cases. It was most recently applied two years ago in the case of *44 Liquormart v. Rhode Island.*[6]

In *44 Liquormart*, the Supreme Court unanimously struck down two Rhode Island laws that banned the advertising of retail liquor prices. The first law (and its regulations) banned price advertising by sellers except for price tags and signs displayed with the merchandise and not visible from the street. The second law made it a misdemeanor for any newspaper, periodical, or broadcast medium to carry an advertisement that contained the price of any alcoholic beverage. These two laws had been on the statute books for 40 years.

When the laws were challenged, the State justified its laws as helping promote temperance. The High Court agreed that the State's interest in temperance was both legitimate and substantial, but the State could not pursue that legitimate end by the particular, speech-restricting means it had chosen. The Rhode Island laws were held to violate the free speech guarantees of the First Amendment.

The Supreme Court measured the Rhode Island statutes against the standards for commercial speech that were announced in *Central Hudson Gas & Electric Corp. v. Public Service Commission.*[7] This "*Central Hudson* test" asks four questions:

- Does the speech concern lawful activity and is the speech not misleading?
- Is the asserted governmental interest substantial?
- Do the regulations "directly advance the government interest" that has been asserted?
- Is the regulation "not more extensive than is necessary to serve that interest"?

Central Hudson gives the test. *44 Liquormart* emphasizes that the elements of the test are to be applied scrupulously and without deference to legislative judgment. If the tobacco bill has to pass the *Central Hudson - 44 Liquormart* test (and such currently is the law), then there is a strong likelihood that important provisions of the tobacco bill will be held unconstitutional.

It may be emphasized that some particulars of *44 Liquormart* are not altogether clear. There were four opinions in the case, and the lead opinion of Justice Stevens did not attract a majority of the court for any of its substantive parts. Nevertheless, the attitude and direction of the Court are clear, and *44 Liquormart* was another strong statement on behalf of those who employ, and those who receive or are intended to receive, commercial messages.

---

[6] 517 U.S. 484 (May 13, 1996).

[7] 447 U.S. 557, 566 (1980).

The Baltimore Billboard Cases

The Baltimore cases were pending at the Supreme Court when *44 Liquormart* was decided. Within weeks of that decision, the Court granted review, vacated the judgments, and remanded the cases to the Fourth Circuit for consideration in light of *44 Liquormart*.[8] There were two Baltimore cases, one on advertising alcohol and one on advertising tobacco:

- In *Anheuser-Busch v. Schmoke* the City of Baltimore had forbidden advertisements for alcoholic beverages on outdoor signs. The ordinance had been upheld by the Fourth Circuit and, after remand from the U.S. Supreme Court, the court upheld the law again, and the Supreme Court refused to review the case a second time.[9] The Supreme Court's refusal to grant review by denying a writ of certiorari is not a decision on the merits; it is merely a refusal to hear the case.[10]

- In the companion, *Penn Advertising v. Mayor & City Council of Baltimore*, the City of Baltimore had forbidden advertisements for cigarettes on outdoor signs. As with alcohol, the ordinance had been upheld by the Fourth Circuit and, after remand from the U.S. Supreme

---

[8] There were two other related cases that the Court treated in the same manner: The first case questioned the constitutionality of a federal law (18 U.S.C. §1304) that prohibits radio and television ads for casino gambling. The statute had survived the lower courts, but the case was remanded following *44 Liquormart* and remains pending at the Fifth Circuit. *Greater New Orleans Broadcasting Assoc. v. United States*, 69 F.3d 1296 (5th Cir. 1995), *vacated & remanded for consideration in light of 44 Liquormart*, 117 S. Ct. 39 (Oct. 7, 1996). The second case questioned the constitutionality of a Pennsylvania State advertising ban that was substantially the same as Rhode Island's. The statute had been upheld by the State courts, but after the United States Supreme Court remanded the case for consideration in light of *44 Liquormart* the Pennsylvania Supreme Court held that the law violated the First Amendment. The Pennsylvania statute was so like Rhode Island's that the Pennsylvania Supreme Court thought that it had little choice. *Pennsylvania State Police v. Hospitality Investments*, 650 A.2d 854 (Penna. 1994), *vacated & remanded for consideration in light of 44 Liquormart v. Rhode Island,* 517 U.S. 1206 (May 20, 1996). On remand, *Pennsylvania State Police v. Hospitality Investments*, 689 A.2d 213 (Penna. 1997).

[9] *Anheuser-Busch v. Schmoke*, 63 F.3d 1305 (1995), *vacated & remanded for consideration in light of 44 Liquormart v. Rhode Island,* 517 U.S. 1206 (May 20, 1996). On remand, *Anheuser-Busch v. Schmoke*, 101 F.3d 325 (4th Cir. Nov. 13, 1996), *cert. denied,* 117 S. Ct. 1569 (April 28, 1997).

[10] E.g., *Teague v. Lane*, 489 U.S. 288, 296 (1989).

Court, upheld again, and the Supreme Court refused to review the second decision.[11] As noted above, the Supreme Court's refusal to take a case is not a decision on the merits.

Of course, the Baltimore ordinances could be sustained only if they could be distinguished from the Rhode Island laws that had been struck down in *44 Liquormart*. The Fourth Circuit concluded that the Baltimore ordinances, unlike the Rhode Island laws, were indeed sufficiently effective and tailored to the protection of young people to survive the third and fourth parts of the *Central Hudson* test. The court of appeals said:

> ". . . Baltimore's ordinance expressly targets persons who cannot be legal users of alcoholic beverages, not legal users as in Rhode Island. More significantly, Baltimore does not ban outdoor advertising of alcoholic beverages outright but merely restricts the time, place, and manner of such advertisements. And Baltimore's ordinance does not foreclose the plethora of newspaper, magazine, radio, television, direct mail, Internet, and other media available to Anheuser-Busch and its competitors."[12]

> "[T]he differences between the Baltimore and Rhode Island regulations further support the constitutionality of Baltimore's ordinance. In contrast to Rhode Island's desire to enforce adult temperance through an artificial budgetary constraint, Baltimore's interest is to protect children who are not yet independently able to assess the value of the message presented. This decision thus conforms to the Supreme Court's repeated recognition that children deserve special solicitude in the First Amendment balance because they lack the ability to assess and analyze fully the information presented though commercial media. . . ."[13]

One judge on the Fourth Circuit panel dissented. He did not reach the merits of the case but argued that the case should be sent back to the district court for a hearing to gather facts sufficient to answer the third and fourth prongs of the *Central Hudson* test. The dissenter said:

> "Whether [the ordinance's] restriction advances the asserted governmental interest and whether it is unnecessarily extensive raise factual questions that only an evidentiary hearing can answer. . . . The court should base its evaluation of the case on the facts underlying the dispute and the reasonable inferences drawn from those

---

[11] *Penn Advertising v. Mayor & City Council of Baltimore*, 63 F.3d 1318 (1995), *vacated & remanded for consideration in light of 44 Liquormart v. Rhode Island,* 116 S. Ct. 2575 (July 1, 1996). On remand, *Penn Advertising v. Mayor & City Council of Baltimore*, 101 F.3d 332 (4th Cir. Nov. 13, 1996), *cert. denied*, 117 S. Ct. 1569 (April 28, 1997). *See also*, *Lindsey v. Tacoma-Pierce County Health Dept.*, —*F. Supp.* —, 1998 U.S. Dist. Lexis 3427 (D.W.Wash. Mar. 16, 1998) (county ordinance prohibiting outdoor advertising of tobacco products *held* constitutional under *Central Hudson* test by a federal district court).

[12] *Penn Advertising v. Mayor & City Council of Baltimore*, 101 F.3d at 329.

[13] *Id.* (citing the Supreme Court's cases on minors and indecent or obscene expression).

facts rather than the version of the facts that appears in the allegations and legislative findings. By affirming the district court's judgment without adducing and examining the facts, a reviewing court engages in the type of deferential review that *44 Liquormart* deems improper."[14]

The dissent emphasizes what may be the key point of *44 Liquormart*, namely that courts are *not to defer* to legislative judgments in commercial speech cases where *Central Hudson* is being applied.[15] This point was made most emphatically in *44 Liquormart* by the way in which the Supreme Court handled one of its earlier cases, *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986).

In *Posadas*, the Supreme Court had deferred to the judgment of the Puerto Rican legislature on an issue of casino advertising. In *44 Liquormart*, the Court beat a retreat from that deferential attitude. Justice Stevens wrote:

> "[O]n reflection, we are now persuaded that *Posadas* erroneously performed the First Amendment analysis. . . . Given our longstanding hostility to commercial speech regulation of this type, *Posadas* clearly erred in concluding that it was 'up to the legislature' to choose suppression over a less speech-restrictive policy."[16]

And, Justice O'Connor wrote:

> ". . . Since *Posadas*, however, this Court has examined more searchingly the State's professed goal, and the speech restriction put into place to further it, before accepting a State's claim that the speech restriction satisfies First Amendment scrutiny [citing 5 cases]. In each of these cases we declined to accept at face value the proffered justification for the State's regulation, but examined carefully the relationship between the asserted goal and the speech restriction used to reach that goal. The

---

[14] *Id.* at 332 (Butzner, J., dissenting) (2 paragraphs combined).

[15] *Central Hudson* is not the standard in every case raising questions of commercial speech. The year after *44 Liquormart*, the Supreme Court held that *Central Hudson* was not the correct test to apply in judging the constitutionality of marketing orders that assessed growers of fruit for the costs of generic advertising. *Glickman v. Wileman Brothers & Elliott*, 117 S. Ct. 2130 (June 25, 1997) (5-to-4 decision).

[16] *44 Liquormart v. Rhode Island*, 517 U.S. at 509, 1996 U.S. Lexis 3020 at *45-*46 (op. of Stevens, J., for 4 members of the Court) (2 paragraphs combined).

closer look that we have required since *Posadas* comports better with the purpose of the analysis set out in *Central Hudson*, by requiring the State to show that the speech restriction directly advances its interests and is narrowly tailored. . . ."[17]

Are the Baltimore Cases Good Law?

The proponents of the tobacco bill point to the Baltimore cases to buttress their claim that Congress can restrict tobacco advertising without first getting the consent of the companies. However, there are three important reasons for doubting the persuasiveness of the Baltimore cases. All of these reasons are interrelated because the law and the facts are intertwined.

First, the regulation of billboards may be novel. The law appears to follow commonsense: Based on such considerations as traffic safety, aesthetics, the protection of property values, and so on, a government may be able to justify regulations on billboards which it could never apply to newspapers or magazines. Indeed, the Supreme Court has expressly approved a billboard ordinance, *Metromedia v. City of San Diego*.[18]

Following *44 Liquormart*, a billboard ordinance of the City of Seattle was challenged as unconstitutional. Plaintiffs argued that *Metromedia* was no longer good law unless its law was coupled with the additional scrutiny required by *44 Liquormart*. In reply, the Ninth Circuit said:

> "[Plaintiff] argues that the [Supreme] Court's application of *Central Hudson* to other types of commercial speech restrictions [here citing *44 Liquormart* and four other cases] has somehow undermined *Metromedia's* vitality with respect to billboards. However, the [Supreme] Court itself has never said so. To the contrary, the Court has continued to rely on its conclusion in *Metromedia* that a city's interest in avoiding visual clutter suffices to justify a prohibition of billboards, and it expressly reaffirmed that conclusion in *Members of the City Council of Los Angeles v. Taxpayers for Vincent* (1984) (upholding a Los Angeles ordinance that prohibited the posting of signs on public property)."[19]

Lawful restrictions that apply to billboards probably are poor precedents for other speech-related restrictions. As billboards are different, so billboard law is different.

---

[17] *Id.* at 531-32, *81-*82 (O'Connor, J., concurring & joined by 3 other justices).

[18] 453 U.S. 490 (1981).

[19] *Ackerley Communications v. Krochalis*, 108 F.3d 1095, 1099 (9th Cir. Feb. 4, 1997) (footnote & citation omitted).

Second, the Baltimore ordinances were relatively narrow — especially when contrasted with the kinds of restrictions that may be imposed on tobacco companies in other contexts.

The Baltimore ordinance said that "No person may place any sign, poster, placard, device, graphic display, or other form of advertising that advertises cigarettes in a publicly visible location," and the term "publicly visible location" was defined to "include" "outdoor billboards, sides of buildings, and free standing signboards."[20] The ordinance did not extend to signs on the sides of buses or to signs in ball parks.[21] We already have quoted the Fourth Circuit's declaration that "Baltimore's ordinance does not foreclose the plethora of newspaper, magazine, radio, television, direct mail, Internet, and other media available" to advertisers.

Compare Baltimore's ordinance with the sweeping regulations that the Food and Drug Administration (FDA) is attempting to impose on tobacco manufacturers, distributors, and retailers. These regulations have been struck down, not on First Amendment grounds but as beyond the statutory authority of the agency (appeals are being taken).[22] Among other things, the FDA regulations:

- require all print ads to be in black text on a white background (*i.e.*, color is forbidden) unless adults constitute 85 percent or more of the readership of the publication;
- require all radio ads to use words only, without music or sound effects;
- require all TV ads to use static black text on a white background, without music or sound effects;
- prohibit outdoor advertising within 1,000 feet of a playground or school; and
- prohibit brand-name (and logo) sponsorship of events, teams, and merchandise.

Additionally, and amazingly, the FDA regulations require 30-day notice to that government agency whenever a manufacturer, distributor, or retailer plans to run an ad on radio or television.

---

[20] *Penn Advertising v. Mayor and City Council of Baltimore*, 63 F.3d at 1321 n. 1.

[21] *Penn Advertising v. Mayor & City Council of Baltimore*, 101 F.3d at 332 (Butzner, J., dissenting).

[22] *Coyne Beahm v. Food & Drug Administration*, 966 F. Supp. 1374 (M.D. N.C.) (April 25, 1997) (on appeal) (constitutional questions not reached, but FDA held to have statutory authority "to impose access restrictions and labeling requirements on tobacco products" but *not* "to restrict their advertising and promotion"). The regulations on advertising and promotion appear at 21 CFR, Part 897, Subpart D (1997 ed.).

The FDA regs can be compared to the restrictions in the tobacco bill.[23] Keep in mind, of course, that the FDA regs were promulgated with "the stick" of regulatory power, but the provisions of the tobacco bill are intended to be freely accepted by tobacco manufacturers who agree to accept "the carrot" of a liability cap.

The Baltimore ordinances were relatively narrow and the Fourth Circuit upheld them.[24] That same result cannot be anticipated for regulations that sweep broadly.

Third, and most fundamental, there is considerable doubt that the Fourth Circuit correctly applied the *Central Hudson* test as interpreted in *44 Liquormart* (unless, of course, the Fourth Circuit merely was using a more deferential standard because the ordinance regulated billboards only, see above).

As noted in the dissent in the Baltimore cases, the burden is on the government to show that its regulations "directly advance" the government's substantial interest and are "no more extensive than is necessary to serve that interest." It does not appear that the Fourth Circuit required Baltimore to make that showing. In *44 Liquormart*, Justice Stevens wrote:

> "In evaluating the ban's effectiveness in advancing the State's interests, we note that a commercial speech regulation 'may not be sustained if it provides only ineffective or remote support for the government's purpose.' For that reason, the State bears the burden of showing not merely that its regulation will advance its interests, but also that it will do so 'to a material degree.'[25]

And Justice O'Connor's opinion in *44 Liquormart* emphasized that the government must consider alternatives that do not restrict speech:

> "The fit between Rhode Island's method and this particular goal [keeping prices up to keep consumption low] is not reasonable. If the target is simply higher prices

---

[23] In the tobacco bill (S. 1415), section 1404(a)(1) of the committee substitute of May 18 (which applies only to those manufacturers which agree to the provisions of the bill) provides, among other things, that tobacco advertising and packaging cannot contain a human image, an animal image, or a cartoon character; cannot appear out-of-doors (which includes enclosed stadiums and buses); and cannot appear on the Internet unless persons under the age of 18 years cannot get to it. Additionally, the tobacco bill adopts the requirements of the FDA regs for black and white text in print media; static black text on white background without words or sound effects in video media; and words without music or sound effects in audio formats.

[24] As noted before, a federal district court also has upheld a law prohibiting tobacco advertising on billboards. *Lindsey v. Tacoma-Pierce County Health Dept., supra* n. 11.

[25] *44 Liquormart v. Rhode Island*, 517 U.S. at 505, 1996 U.S. Lexis 3020 at *37 (op. of Stevens, J., for 4 members of the Court) (citations omitted).

generally to discourage consumption, the regulation imposes too great, and unnecessary, a prohibition on speech in order to achieve it. The State has other methods at its disposal — methods that would more directly accomplish this stated goal without intruding on sellers' ability to provide truthful, nonmisleading information to customers. . . ."[26]

In an article that seems to have exerted a powerful influence on the High Court, Professor Philip Kurland wrote:

> "[O]nce it is determined that the speech in question 'concerns a lawful activity and is not misleading or fraudulent,' the burden is on the government not merely to assert that it has a 'substantial' interest, but to demonstrate the nature of that interest by something more than an *ipse dixit*. [Citing 10 cases] So, too, is it the government's obligation to demonstrate, not merely to assert, that the means it has chosen — suppression of speech — will be effective to secure the ends it seeks, and that there are no alternate reasonable means to the ends sought not involving censorship of speech."[27]

The Fourth Circuit seems to have given Baltimore's ordinance a more liberal reading than the precedents would allow. Certainly, that charge will be true if the deferential approach of the Fourth Circuit is applied in a subsequent case that does not involve a billboard.

Since *44 Liquormart*, other United States courts of appeals have rendered decisions in five cases where the *Central Hudson - 44 Liquormart* standard was applied. (This count omits the Baltimore billboard cases and the *Ackerley* billboard case which are discussed above.) In each case, the other courts applied *Central Hudson - 44 Liquormart* rigorously and, in *every one* of the five cases, the governmental restriction on commercial speech was struck down as an unconstitutional abridgement of the First Amendment's guarantees of free speech.

By looking only at the Baltimore billboard cases, which did indeed involve the regulation of tobacco advertising,[28] there is a risk of missing the constitutional forest for a couple of trees that the

---

[26] *44 Liquormart v. Rhode Island*, 517 U.S. at 530, 1996 U.S. Lexis 3020 at *79 (O'Connor, J., concurring & joined by 3 other justices).

[27] P. Kurland, "*Posadas de Puerto Rico v. Tourism Co.*: ''Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful'," 1996 S. Ct. Rev. 1, 7.

[28] The Supreme Court does not recognize a special rule for commercial speech about "vices". For example, the Court has refused the Federal Government's invitation to give legislatures "broader latitude to regulate speech that promotes socially harmful activities, such as alcohol consumption." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 n. 2 (1995). See also, *44 Liquormart*, 517 U.S. at 514 (op. of Stevens, J.).

Fourth Circuit let stand in Baltimore. The contrary cases, five cases from three circuits, are as follows:

1. In *Bad Frog Brewery*,[29] the Second Circuit enjoined the State of New York from continuing to refuse to approve a beer label that features a frog making an obscene gesture. The court held that the state's refusal could not be squared with the third and fourth prongs of the *Central Hudson* test.

2. In *Miller v. Stuart*,[30] the Eleventh Circuit prohibited the State of Florida from enforcing against plaintiffs a statute that prevented CPAs from telling the public about their CPA licenses if they are doing accounting and tax services in certain circumstances. The statute failed the fourth part of the *Central Hudson* test.

3. In *Nordyke v. Santa Clara County*,[31] the Ninth Circuit struck down an addendum to a lease for use of the county fairgrounds that prohibited any use by the lessee for gun shows. The addendum failed the third and fourth parts of the *Central Hudson* test.

4. *Valley Broadcasting Co. v. United States*,[32] the Ninth Circuit held that a federal statute that prohibits broadcast advertisements for private casino gambling, 18 U.S.C. §1304, is unconstitutional because it fails the third prong of the *Central Hudson* test.

5. In *International Dairy Foods Assoc. v. Amestoy*,[33] the Second Circuit struck down a Vermont statute that required the labeling of milk and milk products if Bovine Growth Hormone had been used in their production. The court said the statute failed the *second* prong of the *Central Hudson* test.

As we have emphasized throughout this paper, the concrete application of the *Central Hudson* test is manifestly fact-based. For the five cases listed above, we have provided only the briefest summary of facts. A close reading of each of the cases might reveal some nuance that would distinguish that case from a future tobacco case. However, the central point of the combined cases is this: Restrictions on commercial speech, even restrictions that hitherto would have been unexceptional, are being subjected to heightened judicial scrutiny and are being struck down

---

[29] *Bad Frog Brewery v. New York State Liquor Authority*, 134 F.3d 87 (2d. Cir. Jan. 15, 1998).

[30] *Miller v. Stuart*, 117 F.3d 1376 (11th Cir. July 30, 1997), *cert. denied*, 118 S.Ct. 852.

[31] *Nordyke v. Santa Clara County*, 110 F.3d 707 (9th Circ. April 4, 1997).

[32] *Valley Broadcasting Co. v. United States*, 107 F.3d 1328 (9th Cir. Feb. 25, 1997), *cert. denied*, 118 S. Ct. 1050 (1998).

[33] *International Dairy Foods Assoc. v. Amestoy*, 92 F.3d 67 (2d Cir. Aug. 8, 1996).

regularly. The courts are carefully reviewing the rationale for each restriction on speech, and the restrictions are being struck down unless they are strongly and carefully and narrowly justified.

Conclusion

Since the creation of the modern "commercial speech test" in 1976 in the *Virginia Pharmacy* case, the Supreme Court has, year by year, made the test increasingly muscular. In his concurring opinion in *44 Liquormart*, Justice Thomas said:

> "In case after case following *Virginia Pharmacy Board*, the Court, and individual Members of the Court, have continued to stress the importance of free dissemination of information about commercial choices in a market economy; the antipaternalistic premises of the First Amendment; the impropriety of manipulating consumer choices or public opinion through the suppression of accurate 'commercial' information; the near impossibility of severing 'commercial' speech from speech necessary to democratic decisionmaking; and the dangers of permitting the government to do covertly what it might not have been able to muster the political support to do openly."[34]

If the Court's current *Central Hudson - 44 Liquormart* constitutional test is applied to *mandated* restrictions on tobacco advertising, there is a substantial risk that the restrictions will not survive. This assessment is not, of course, a certainty; it is only an appraisal of the odds, and the odds are steep. Congress is deciding if it is willing to gamble against such odds.

Of course, if the tobacco companies can be coaxed (or enticed or threatened) back into an agreement, the odds in favor of the speech-restricting provisions are great — nearly a certainty.

In the context of the First Amendment, "carrots" are constitutional but "sticks," often, are not.

Staff Contact: Lincoln Oliphant, 224-2946

[Note on background sources: We have found two sources of information especially timely and helpful. First, the written testimony of the witnesses who appeared before the Sen. Judiciary Comm. on May 13, 1998 ably surveyed the major constitutional issues. The witnesses were: David Ogden, Counselor to the U.S. Attorney General; Hon. Gale Norton, Attorney General of Colorado; David Vladeck, Director, Public Citizen Litigation Group; and Burt Neuborne, professor of law (appearing on behalf of the Assoc. of Nat'l Advertisers). Second, H. Cohen, "Tobacco Marketing and Advertising Restrictions in S. 1415, 105th Congress: First Amendment Issues," CRS Rept. for Congress No. 98-466A (May 15, 1998).]

---

[34] *44 Liquormart v. Rhode Island*, 517 U.S. at 520, 1996 U.S. Lexis 3020 at *64 (Thomas, J., concurring) (footnote citing 12 cases omitted).